BPR

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No. 993 of 2003

Santosh Sahu and 2 others

Versus

State of Chhattisgarh

JUDGMENT

Note J.

11/06/07

Post for: 11.06.2007

Sd/-
Sunil Kumar Sinha
Judge

25.05.2007

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.993/2003

APPELLANTS (INJAIL)

1. Santosh Sahu S/o Chova Ram sahu, aged about 20 years, R/o Village Morid, Thana Utai District – Durg (C.G.)
2. Devendra Sahu, S/o Punaram sahu, aged about 19 years, R/o Village Sopali, Thana Uttai, District – Durg.
3. Manoj Kumar sahu, S/o Cheedan lal Sahu, aged about 19 years, Village Morid, Thana Uttai, District – Durg (C.G.)

Versus

RESPONDENT State of Chhattisgarh, Through S.H.O. Thana Uttai, District - Durg

(Appeal under Section 374 (2) of Cr.P.C.)

Appearance:

Shri Uttam Pandey, counsel for the appellants.

Shri G.K. Beriwal, Dy. Advocate General for the State.

JUDGMENT
(11.06.2007)

SUNIL KUMAR SINHA, J.

(1) This appeal is directed against the judgment of conviction and order of sentence dated 2/7/2003 passed in S.T. No.41/2003 by the First Additional Sessions Judge, Durg (C.G.), whereby, the appellants have been convicted under Section 376 (2) (g) of IPC and sentenced to undergo R.I. for 10 years and to pay a fine of Rs.500/-, in default of payment of fine to further undergo R.I. for 1 month.

(2) Seven accused persons namely Santosh Sahu, Devendra Sahu, Manoj Kumar (appellants herein), Naresh, Soni, Jaggu and Rajesh (juvenile offenders) allegedly committed gang rape against 2 minor girls namely Ku. Shyama Nirmalkar (PW-1) and Ku. Sita (PW-2) at about 11:00 p.m. on 25/12/2002. All the juvenile offenders namely Naresh, Soni, Jaggu and Rajesh have been acquitted by the Juvenile Justice Board, Pulgaon vide judgment dated 12/11/2003 passed in Criminal Case No.25/2003. However, these appellants have been convicted by the regular Court in the above Sessions Trial.

(3) The case of the prosecution is that 2 victims namely Ku. Shyama (PW-1) and Ku. Sita (PW-2), both are residents of village – Pachpedi. They are in close relations, as Sita is the daughter of eldest sister of Shyama. Both had gone to visit village – Morid, where, uncle of Sita namely Santosh Nirmalkar (PW-4) was residing with his family. In the night of 25/12/2002, both had gone to see a dance programme in the village. The allegations are that at about 11 p.m., when they were returning back after seeing the dance programme, all the 7 accused persons met them on the way, Shyama (PW-1) was caught by accused – Santosh, Devendra, Naresh, Jaggu and Rajesh, whereas, Sita (PW-2) was caught by accused – Manoj and Soni. They were taken to different sites. Shyama was taken to a nearby place known as *Byara*, where some paddy straw was kept; she was

made undressed and was thrown on the ground. Naresh caught her both the hands and three accused persons committed rape against her. Thereafter, when the fourth one namely Devendra tried to commit rape, she gave him a teeth bite on left side of his forehead and ran away from the place of occurrence. Sita was taken to another place near a dam, where Soni Goswami gagged her mouth and accused – Manoj and Soni Goswami committed rape against her. When Shyama narrated the story to her aunt – Dulasiya Bai, they went in search of Sita, who met them on the way and she also narrated the story to them. Thereafter, they narrated the story to the other villagers and ultimately, F.I.R. vide Ex.P/1 was lodged by Ku. Shyama (PW-1) in Police Station – Utai on 26/12/2002, at about 11:30 a.m. The F.I.R. contains the names of all the 7 accused persons.

(4) During the course of investigation, the victims were sent for medical examination. Victim – Shyama (PW-1) was examined by Dr. Kalpana Sharma (PW-9). She prepared her report Ex.P/22. According to her, there were no external injuries on the body of the victim except that she was complaining some pain on her left breast. There were no external injuries on her private parts, hymen was ruptured and no definite opinion could be given regarding recent sexual intercourse. Victim – Sita (PW-2) was examined by Dr. (Smt.) P. Dani (PW-8). She prepared her report Ex.P/20. According to her, there were no external injuries

on the body of the victim, vagina was admitting one finger and uterus was normal. However, there was a linier abrasion on the post-side of vagina and no definite opinion could be given about sexual intercourse. The accused persons were also sent for medical examination. Jaggu @ Jageshwar, Manoj Sahu, Santosh Sahu and Devendra Sahu were examined by Dr. Anil Agrawal (PW-11), who prepared the reports vide Ex.P/24-A, Ex.P/26-A, Ex.P/28-A and Ex.P/29-A respectively. The medical reports of all the accused persons were normal and they were shown to be capable to perform sexual intercourse. There were no external injuries on the bodies of these accused persons except that of Devendra, as there was an abrasion over the left side of his forehead at about 1 ½ inch away from the eye-brow admeasuring 1 ½ cm x ½ cm, irregular in shape, reddish in colour, skin slough out, in which clotted-blood was seen over the injury region. According to the report, this injury may have been caused by a hard object and it was simple in nature.

(5) Apart from the above, evidence pertaining to the age of the victims were also collected and after completion of usual investigation, charge sheet was filed in the Court of Judicial Magistrate First Class, Durg vide Criminal Case No.12/2003, who in turn committed the matter to the Court of Sessions vide order dated 6/2/2003, from where, it was received on transfer

by the First Additional Sessions Judge, Durg, who conducted the trial and passed the impugned judgment.

(6) The Sessions Court recorded a finding that victim – Shyama (PW-1) was aged about 15 years 8 months 26 days, whereas, victim – Sita (PW-2) was aged about 12 years 11 months 20 days on the date of incident. Relying on the testimonies of these two witnesses, it further recorded a finding that these two minor victims were subjected to forceful sexual intercourses by the accused persons, whereby, they were guilty of the offence punishable under Section 376 (2)(g) of IPC.

(7) Learned counsel for the appellants has not disputed the finding pertaining to the age of the victims. His submission was that according to prosecution itself, the victims were the residents of a different village and they had come to their uncle's place i.e. Village – Morid for the first time and the appellants were not previously known to them, therefore, lodging of the F.I.R. by Shyama (PW-1) containing the names of accused persons appears to be unnatural and suspicious. He also submitted that it has come in the evidence of both the victims that they did not know the accused persons, therefore, conducting of an identification parade was essential in this case, which has not been done by the prosecution. He further submitted that even otherwise also, the important admissions on

the part of the victims regarding factum of identification of the accused persons, which creates suspicion regarding their participation in commission of the crime, have been ignored by the Sessions Judge and on the face of it, testimonies of these two victims pertaining to participation of the appellants and their dock identification should be disbelieved and they should be acquitted.

(8) On the other hand, learned counsel for the State opposed these arguments and supported the judgment of conviction and order of sentence passed by the Sessions Court.

(9) I have heard learned counsel for the parties at length and have also perused the records of the Sessions Trial.

(10) So far as requirement of Test Identification Parade (T.I.P.) is concerned, the law is that even without T.I.P., identification in Court can be believed. It has been held by the Apex Court in the matter of ***Ronny v. State of Maharashtra AIR 1998 S.C. 1251*** that the identification of the accused by a witness if he had an opportunity to interact with him or to notice his distinctive features lends assurance to his testimony in Court and that the absence of corroborative evidence by way of test identification parade would not be material.

(11) In the matter of ***George v. State of Kerala AIR 1998 S.C. 1376***, the Apex Court further held that the identification of an accused in Court is the substantive evidence of the person identifying and his earlier identification in a T.I. parade corroborates the same. In other words, want of evidence of earlier identification in a T.I. parade does not affect the admissibility of the evidence of identification in Court.

(12) The Apex Court again held in the matter of ***Dastagir Sab and another vs. State of Karnataka (2004) 3 S.C.C. 106*** that non-holding of T.I. parade would not by itself disprove the prosecution case. To what extent and if at all the same would adversely affect the prosecution case; would depend upon the facts and circumstances of each case.

(13) Therefore, it is settled that even without T.I.P., identification in Court can be believed and the result of T.I.P. is not substantive evidence, it can be used only for corroboration or contradiction. Prudence requires corroboration of identification in court by prior T.I.P., but absence of T.I.P. is not fatal if accused persons were known earlier to witness or if they had been sufficiently described in the complaint or if accused persons had been arrested at the spot.

(14) In the present case, admittedly, the accused persons have been named in the FIR lodged by the victim – Shyama (PW-1). So

far as prosecution is concerned, their contention is that since the accused persons were named in the FIR, therefore, there was no necessity of T.I. parade in this case. The question arises as to what was the source of information with the maker of the FIR to mention the names of the accused persons therein? If we look into the evidence of Shyama (PW-1), it comes in para 8 of her cross-examination that since the accused persons were calling each other by taking their names, she could come to know about their names and on this basis only, she has named them in the FIR. Her admission in this regard is clear and unambiguous, which reads as follows : ,

> "यह कहना सही है , कि मैं जो प्र॰सू॰ पत्र में बारी बारी से संभोग करने की बात अभियुक्तों के नाम से लिखाई थी वो सुनी हुई नामों पर आधारित हैं । यह कहना सही है , कि देवेन्द्र को अंधेरे के कारण पहचान नहीं पाई थी । "

Apart from the above, she has also admitted in this paragraph that since there was darkness, she cannot tell that who had caught her hands and who gagged her mouth. She has further added that there was also darkness in *Byara* (place of occurrence), where some paddy straw was kept, therefore, she could not identify any of the assailants. Therefore, the fact remains that so far as this witness is concerned, she has lodged the FIR by mentioning the names of assailants only on the basis that the assailants were calling each other by taking the above

names. So far as dock identification is concerned, that also becomes suspicious on the admission of this witness that there was complete darkness on the road, where she and the other victim were caught by the assailants, due to which, she could not identify any of them and even she could not identify the assailants at the time of commission of sexual intercourses in *Byara*, because there was complete darkness at that place also.

(15) As far as PW-2 – Sita is concerned, she has also admitted in last 4 lines of her cross-examination that she cannot say as to whether appellant – Manoj, who is present in the Court, had committed sexual intercourse against her or not. She has explained that since the other boy (one of the juvenile offenders), who is not present, was calling like "Manoj Manoj, come this side Manoj", therefore, she is telling that Manoj, who is present in the Court, had committed sexual intercourse against her.

(16) Therefore, in the facts and circumstances of this case, 2 things appear to be very clear. Firstly, the victims did not previously know the accused persons, as they were strangers to them and PW-1 – Shyama had mentioned their names in the FIR on the basis that assailants were calling each other by these names at the time of occurrence and secondly, in fact, as per the admissions of PW-1 and PW-2 vide para 8 and para 5 of their evidence respectively, they could not identify the persons who

had committed sexual intercourses against them. Therefore, firstly, a quick identification was necessary, which has not been done by the prosecution and the dock identification is also not of very much use because in the cross-examinations the victims have admitted that they could not identify the assailants due to darkness.

(17) Another important piece of prosecution evidence is about teeth bite, said to have been given by victim – Shyama (PW-1) to accused Devendra. Admittedly, Devendra was examined by Dr. Anil Agrawal (PW-11), who gave his report vide Ex.P/29-A, in which, he found one abrasion over the left side of his forehead admeasuring 1 ½ cm x ½ cm having irregular shape. About this injury, he has admitted vide para 7 of his cross-examination that the said injury cannot be caused by a teeth bite and this was an injury caused within a duration of 24 hours from the time of his examination, which was conducted by him at 1:50 p.m. on 27/12/2002, whereas the incident took place on 25.12.2002.

(18) No doubt, the victim of rape stands at par with an injured witness and her evidence is to be given much weightage notwithstanding corroboration and the conviction can well be based on her sole testimony, as our legal system has emphasized on value, weight and quality of evidence, rather than quantity, multiplicity or plurality of the witnesses, but principally, the fact remains intact that her such testimony must inspire confidence

of the Court so as to solely depend on it to record a conviction, leaving no room for a doubt or suspicion against the guilt of the accused.

(19) In the present case, on the face of cross-examination of 2 victims, particularly admissions made by them regarding identification of the assailants, their evidence do not inspire confidence of this Court so as to record a conviction of the appellants on it.

(20) In the opinion of this Court, the Sessions Court committed error of law by convicting the accused persons on such evidence of the victims by completely ignoring their valuable admissions, due to which, dock identification of the accused persons as also mentioning of their names in the FIR both become baseless. The conviction and sentence awarded to the appellants cannot be sustained on such evidence and the same deserve to be set aside.

(21) In the result, the appeal is allowed. The conviction and sentence awarded to the appellants are set aside. They are acquitted of the charges under Section 376 (2) (g) of IPC. It is stated that the appellants are continuously in jail since 27/12/2002. They be released forthwith if not required in any other case.

Sd/-
Sunil Kumar Sinha
Judge